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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1966

No. 667

SEAROAD SHIPPING COMPANY
and SEAROAD (Bahamas) LTD.,
Petitioners,

vs.

E. I. duPONT deNEMOURS AND COMPANY,
INCORPORATED,
Respondent

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit.

W. F. PARKER
516 Ingraham Building
Miami, Florida 33131
Proctor for Petitioner

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PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on May 26, 1966.

CITATIONS TO OPINIONS BELOW.

The as yet unreported opinion of the District Court (R. 45) is printed in Appendix B, infra p. 3, and the opinion of the Circuit Court of Appeals is reported in

361 Federal, Second, 833, and is printed in Appendix B infra p. 13.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 26, 1966 (R 281); p. B 13, infra. Rehearing was denied on July 18, 1966 (R 297) and order extending time for filing petition for Certiorari was entered the same date. (Appendix B, infra, p. 12.) The jurisdiction of this Court in invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Where a contract of affreightment, consisting of a bill of lading and shipper's export declaration, both drawn by the shipper and both specifying that a quantity of dynamite should be transported on a certain landing craft (an L.C.I.) known by him to be without under deck facilities for the carriage of explosives, and that loading should be under the supervision of the United States Coast Guard, is otherwise silent on the matter of stowage, does on deck stowage, in such circumstances, create such a deviation as to render the shipowner liable for the loss overboard of the shipment directly resulting from an unforeseeable peril of the sea, but which, admittedly, would not have occurred in the event of under deck stowage, it being shown that:

(A) The shipper knew, in advance, that the vessel he designated had no under deck facilities for the stowage of dynamite and that, accordingly, his shipment would have to be carried

in a van on deck as had been done on previous occasions. (R 171, 172)

(B) The shipper, by conduct, before and after the loading, consented to and acquiesced in the on deck stowage. (R 171-177)

(C) The shipper admittedly knew from experience and observation that it was the custom to ship explosives out of that particular shallow draft port above deck. (R 171-177)

(D) The contract, conceding it impliedly called for under deck stowage, was illegal in that respect, and, therefore, unenforceable, it appearing that the ship had no approved facilities for such stowage.

STATUTES INVOLVED

The statutory provisions involved are the Dangerous Cargo Act, 46 U.S.C.A. 170, and Coast Guard Regulations issued pursuant thereto. They are printed in Appendix A, infra, pp. 1 & 2.

STATEMENT

The acknowledged agent of the Respondent, the shipper, prepared and delivered a bill of lading and a shipper's export declaration providing specifically for the shipment of a quantity of his dynamite from the shallow draft port of Key Largo, Florida, to Freeport, Bahamas, aboard the Petitioners' landing craft, the M/V "LILLIAN," with which he was thoroughly familiar by reason of previous

shipments made thereon (R 171-177). With the exception of the provision that the explosives were to be loaded under the direction of the Coast Guard the documents were silent as to where they were to be stowed aboard ship which fact, the Respondent insisted, impliedly called for under deck carriage, notwithstanding his certain knowledge of fact that they would have to be carried above deck because the vessel had no magazine below deck. (Libellant's exhibits 1 and 2)

The shipment was duly received and placed in a van securely lashed to the deck of the ship in the presence of the shipper's acknowledged agent and at the direction of the Coast Guard officers assigned to the task of supervising the operation who forthwith issued their certificate attesting the fact that the shipment had been properly loaded. (R 177. Copy of Certificate Appendix B, infra, p. 22).

Upon departure the Captain received a radio report from the United States Weather Bureau predicting favorable conditions for the next twenty-four hours, which was twice the time ordinarily required for the projected voyage (R 197). An expert from the bureau called by the Respondent testified that catastrophic winds of 50-56 k.p.h. could be expected at that time of year on an average of only once every five weeks (R 245).

Contrary to reports and expectations, such winds were encountered towards the end of the voyage, as a result of which, and no other cause, the van and contents were lost overboard.

The Respondent's acknowledged agent testified to the

effect that he knew that it was the custom of the shallow draft port of Key Largo to stow Bahamas bound explosives above deck as he had made eight such shipments (two aboard the same M/V "LILLIAN") during the preceding year, and that all of them had been under "clean" bills of lading similar to the one here involved (R 38, 39-171 to 177). The Respondent produced a witness in rebuttal but he turned out to be more confirmatory than contradictory. While testifying that at least fifty percent of the explosives moved above deck he couldn't remember a single ship engaged in the Bahamas trade that stowed it under deck. (R 101)

In midstream of the trial the Respondent sought and obtained leave to amend so as to plead unseaworthiness but made no attempt to prove it, and so there was no showing as to this or negligence, the evidence all being to the contrary.

The Trial Court, finding that the loss was due to a deviation, and the fault and neglect of the Petitioner, (Ap. B, infra, p. 3), entered judgment for the Respondent for the value of the lost shipment (R 52) and the Fifth Circuit affirmed. (Appendix B. p. 13). On July 18, 1966 petition for rehearing was denied and time for filing petition for Certiorari was extended for ninety days. (Appendix B. p. 12)

REASONS FOR GRANTING THE WRIT

I

The Fifth Circuit in affirming the District Court, held, in effect, that, unlike other negotiable instruments,

an unnegotiated bill of lading is so sacrosanct that even its implied provisions are so inviolate as to defy interpretation and the determination of the real understanding and agreement of the parties initially involved by means of such generally accepted indices as the conduct of the parties before and after the event, consent and waiver, estoppel by conduct, and conflicting statements written into the instrument by the complaining party, and that, accordingly, a strained, unrealistic and equitably unwarranted construction of the carriage contract herein involved must prevail, all as is clearly indicated by the following;

(a) The shipper in preparing the bill of lading and the export declaration specifically designated a carrier which he knew, from observation and previous shipping experience, had no under deck facilities for the transporting of dynamite and that, accordingly, his cargo would have to be stowed above deck just as had been the case with two previous shipments of his explosives on the same vessel and with three other similar ships working out of the same port during the preceeding 12 months. (R 171-177)

(b) The shipper obviously knew what the directive "to be loaded only under the supervision of the Coast Guard" meant when he included it in the shipping documents he drew and that he was thereby contracting, not for any particular kind of stowage, but whatever stowage the officers might direct and that, judging from

past experiences, it would have to be above deck stowage. (R 177)

(c) The shipper was actually present when his cargo was loaded aboard and saw it stowed above deck without protest. (R 177)

(d) The shipper knew it was the custom of the port of Key Largo to stow Bahamas shipments of dynamite above deck. (R 171-177)

The Opinion of the Fifth Circuit in this case is, therefore, in direct conflict with the Opinion of this Court in "THE CARLOS F. ROSES," 177 U.S. 655, 44 Law Ed. 929, the pertinent part of which reads as follows:

> "Bills of lading stand as the substitute and representative of the goods described therein, and, while quasi-negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferrer's title to the goods described, and the **presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies.** A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession **only if such is the intention of the parties, that intention is open to explanation.** Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it." (Emphasis supplied)

II

It appearing from the testimony of the shipper's acknowledged agent that he, by reason of previous shipments and observations, was thoroughly familiar with the practices employed at Key Largo and that, so far as he was concerned, which is what really matters, the custom there prevailing was one hundred per cent for on deck stowage of explosives, the Opinion of the Fifth Circuit is in direct conflict with the opinion of this Court in THE DELAWARE, 81 U.S. 579, the pertinent part of which reads as follows:

> "Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a clean bill of lading, that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master, except the usual one of the dangers of the sea, the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of the general rule applied in such controversies." (Emphasis supplied)

III

For the reasons noted here, and others appearing of record, there never was a meeting of minds as between the parties calling for under deck stowage, but if it should be conceded that there was such an understanding any

contract based thereon would be unenforceable as being contrary to law.

The DANGEROUS CARGO ACT, 46 U.S.C.A. Sec. 170, (Appendix A Infra p. 1) provides, inter alia, that the Coast Guard shall supervise the loading of explosives aboard ships and grants it authority to make regulations with respect thereto. One of the regulations made pursuant to such authority, Sec. 146.20-100, pp. 104 to 127 Code of Federal regulations, directs that dynamite shall be stowed in a "magazine," while Sec. 146.09-1 (Appendix A, p. 2, infra) specifies the location of such a facility:

> "Magazines, location of: (a) Magazines shall be located in a **hold**, preferably a tween deck hold that is dry and well ventilated. (Emphasis supplied)

Then Sec. 146.20-15 p. 92, specifically limits the authority of a District Commander to make an exception and permit the stowage of dynamite on deck in small quanties to those cases where it is shown that there is no magazine below decks:

> "The District Commander or the Captain of the port may approve the stowage of blasting caps or small quantities of explosives in locations other than 'under deck,' such as in an isolated compartment, mast or deck house, or in magazines (which may be portable) secured 'on deck' — provided:
>
> (1) No other stowage is available." (Appendix A, p. 2, infra)

It, therefore, necessarily follows that when the Coast Guard issued its certificate in this case attesting the fact that the subject dynamite had been properly stowed, which, incidentally, was never challenged and must therefore be accepted as authoritative, it, ipso facto, established the non existence of proper below deck storage facilities and the consequent illegality of any putative agreement, written or implied, providing for such stowage aboard this particular vessel. (Appendix B, p. 22, infra)

The Question involved herein is an extremely important one as it bears directly on the legal effect of negotiable instruments in daily use throughout the country.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

W. F. PARKER
516 Ingraham Building
Miami, Florida 33131
Proctor for Petitioner

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari was served on Richard Ralph, Ingraham Building, Miami, Florida, Proctor for Respondent, this ____ day of _____, 1966.

_____

W. F. PARKER

APPENDIX "A"

(Statutory provisions cited and quoted)

46 U.S.C.A. 170 (5)

"It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any vessel other than a passenger-carrying vessel, any high explosive referred to in subsection (4) of this section except as permitted by the regulations of the Commandant of the Coast Guard established hereunder."

46 U.S.C.A. 170 (7-a)

"The Commandant of the Coast Guard shall also establish regulations with respect to the marking, handling, storage, stowage, and use of explosives or other dangerous articles or substances on board such vessels; with respect to the disposition of any explosives or other dangerous articles or substances found to be in an unsafe condition; with respect to the necessary shipping papers, manifests, cargo-stowage plans, and the description and descriptive names of explosives or other dangerous articles or substances to be entered in such shipping documents; also any other regulations for the safe transportation, carriage, conveyance, storage, stowage, or use of explosives or other dangerous articles or substances on board such vessels as the Commandant of the Coast Guard shall deem necessary; and with respect to the inspection of all the foregoing mentioned in this paragraph."

46 U.S.C.A. 170 (7-b)

"The transportation, carriage, conveyance, storage, stowage, or use of such explosives or other dangerous articles or substances shall be in accordance with the regulations so established, which shall, insofar as applicable to them, respectively, be binding upon shippers and the owners, charterers, agents, masters, or persons in charge of such vessels, and upon all other persons transporting, carrying, conveying, storing, stowing, or using on board any such vessels any explosives or other dangerous articles or substances."

COAST GUARD REGULATIONS

par. 146 20-15 (b)

"The District Commander or the Captain of the Port may approve the stowage of blasting caps or small quantities of explosives in locations other than 'Under deck,' such as in an isolated compartment, mast or deck house, or in magazines (which may be portable) secured 'On deck' provided:

(i) No other stowage is available."

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action in rem against the Motor Vessel "SEA LANE" (ex. "Lillian"); and in personam against SEA ROAD SHIPPING COMPANY, a Florida corporation, who also claimed the vessel, for loss of a cargo of explosives. The cause came on for trial on September 29 and 30, 1964; and the Court having considered the pleadings and the evidence, now files the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Libelant is, and was at the times material hereto, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and was the shipper and owner of the explosives in question.

2. The Claimant, Respondent, Searoad Shipping Company, is, and was at the times material hereto, a Florida corporation and at the times material hereto charterer of the Motor Vessel "LILLIAN," whose name was subsequently changed to "SEA LANE" prior to seizure under process in this cause.

3. The explosives in question were to be carried from a loading area at Key Largo in the Florida Keys, commonly known as "the Key Largo Facility" to Freeport-Grand Bahama, Island, a foreign port in the Bahama Islands, according to bills of lading which were introduced

as Libelant's Exhibit 1A and 1B. These bills of lading were not claused for on deck carriage.

4. The explosives in question were loaded aboard the Respondent vessel, then known as "LILLIAN," at the Key Largo Facility the afternoon of February 6, 1963, and were stowed on deck in a trailer located on the after deck. The trailer was secured with eight chains and turnbuckles, four on each side, from the trailer to fittings in the deck. Two steel pipe stands were positioned on each side of the rear end of the trailer and wooden pallets positioned under the forward end of the trailer. The chains were made taunt by use of the turnbuckles.

5. The vessel broke ground at approximately five o'clock P.M., E.S.T., February 6, 1963, and after reaching open water set its course for Grand Bahama Island.

6. The Respondent vessel was approximately 150 feet in length, 24 feet in width, and was drawing approximately 7 feet with a freeboard of approximately 5 feet. The vessel had two hatches servicing two cargo holds which contained general cargo loaded at Miami, Florida, prior to the vessel proceeding to Key Largo. The vessel had a flush deck with bulwarks at the bow, the remainder of the deck area being encompassed by life lines and stanchions.

7. Weather and the seas worsened by 9:30 P.M., E.S.T., February 6, 1963, and continued to worsen. At about 11:45 P.M., E.S.T., one of the eight chains parted and was replaced and a "trailer watch" established. Weather and seas continued to worsen and at about 3:55 A.M., E.S.T., February 7, 1963, all chains on the port side

of the trailer parted and it and its contents went overboard, parting the chains on the starboard side, and became totally lost. The vessel arrived at West End, Grand Bahama, about 7:00 A.M., E.S.T., February 7, 1963.

8. The winds with gradual change had shifted from south westerly at the time of departure to west, north westerly for some time prior to the loss of the trailer, estimated by the captain to have been coming from about 300°, per ship's compass (P.S.C.), the vessel having been kept on a north, north easterly course estimated by the captain to have been about 040° P.S.C. The force of the wind and waves was therefore from the vessel's port quarter.

9. The vessel's captain estimated the winds encountered from 50 to 56 CBZ knots. Liabelant respondent introduced certified official United States Weather Bureau maps for time, date and area in question (Libelant's Exhibit 3) and like records of vessel weather reports for the time, date and area (Libelant's Exhibit 4). While the captain's estimate is possible; from a consideration of all of the evidence and testimony, the wind velocity is found not to have exceeded 40 to 45 knots at its height, and the seas not to have exceeded 7 to 10 feet.

10. During the weather and seas encountered the crew could negotiate the open deck. Apart from the trailer going overboard, no physical damage was incurred by the vessel.

11. With the exception of hurricanes, the general weather conditions are worse in the waters in question during the season of each year encompassing the months

of November through March. Based on a representative study of official United States Weather Bureau records and maps for five such seasons by an admittedly competent meteorologist with sixteen years experience, involving the area in question, limited to those instances involving weather patterns and factors comparable to those existing at the time in question as reflected by Libelant's Exhibit 3, reflects that comparable weather conditions existed in the area in question as an average during the five seasons so compared approximately once every five weeks.

12. The weather and seas encountered by the Respondent vessel on the subject voyage on February 6 and 7, 1963, was neither unexpected for the season and waters in question; nor overwhelming, irrestible or catastrophic, in nature; nor were they such that they could not be guarded against by the ordinary exertions of human skill and prudence.

13. There was no business custom or custom in the trade that shipments of explosives from South Florida, to the Bahamas or by shallow draft vessel, be carried on deck. Approximately fifty per cent of the numerous loadings participated in by the witness, Johnson, at the Key Largo Facility for several years prior to the date in question and immediately following involved below deck stowage.

14. Had the explosives been below deck and there afforded proper stowage, they would not have been lost or damaged.

15. The value of the lost and non-delivered ex-

plosives which are the subject of this action was, as stipulated by the parties, Eleven Thousand, Two Hundred Seventy Four and 03/100 ($11,274.03) Dollars.

CONCLUSIONS OF LAW

1. The subject matter of this litigation is within the Admiralty jurisdiction of the Court. The Court has jurisdiction over the parties.

2. The relationship of the parties is governed by the "Carriage of Goods by Sea Act," 46 U.S.C.A. § 1300 et seq.

3. A "clean" bill of lading not claused or providing for on-deck carriage designates stowage under deck, a departure from which as in this case is a deviation rendering the carrier and vessel insurors for all losses or damages occasioned by virtue of the on-deck carriage as opposed to under-deck carriage. e.g. **A/S Ludwig Mowinckels Rederi v. Accinanto, Ltd.** (4th Cir., 1952) 199 F. 2d 134, 135, cert. den. 345 U.S. 992, 73 S. Ct. 1129; cf. **Waterman SS Corp. v. U. S. Smelting, Refining & Mining Co.** (5th Cir., 1946) 155 F. 2d 687, cert. den. 329 U. S. 761, 67 S. Ct. 115.

4. Safety regulations promulgated pursuant to statute permit subject to their terms, under-deck or on-deck stowage of explosives, e. g. 46 C.F.R. §§ 146.20-15; 146.20-19, p. 92.

5. The Respondent failed to:

a. Exercise requisite due diligence to make the ship seaworthy. 46 U.S.C.A. § 1303 (1)(a); e. g. **Edmond**

Well, Inc. v. American West African Line (2d Cir., 1945) 147 F. 2d 363; **Petition of Reliance Marine Transp. and Constr. Corp.** (1st Cir., 1953) 206 F. 2d 240; **Cargo Carriers v. Brown SS Co.** (DC Ny 1950) 95 F. Supp. 288; **The Viscaya** (DC Pa., 1945) 63 F. Supp. 898.

b. Properly and carefully load, handle, stow, carry, keep, care for, and discharge the instant explosives. 46 U.S.C.A. § 1303(2); e. g. **M. W. Zack Metal Co. v. SS Birmingham City** (2d Cir., 1962) 311 F 2d 334; **Schroeder Bros. Inc. v. The Saturnia** (2d Cir., 1955) 226 F. 2d 147; **Daido Line v. Thomas P. Gonzalez Corp.** (9th Cir., 1962) 299 F. 2d 669; **The Guanancita** (DC Fla. 1947) 69 F. Supp. 928; **McNeely & Price Co. v. The Exchequer** (DC Pa., 1951) 100 F. Supp. 343.

c. Establish the loss to have occurred as the result of any excepted causes (46 U.S.C.A. § 1304) alleged. e. g. **Waterman SS Corp. v. U.S. Smelting, Refining & Mining Co.** (5th Cir., 1946) 155 F 2d 687, cert. den. 329 U.S. 761, 67 S. Ct. 115; **Schroeder Bros., Inc. v. The Saturnia** (2d Cir., 1955) supra; and in particular perils of the seas, **Waterman SS Corp. v. U.S. Smelting, Refining & Mining Co.**, supra; **Astemnis Maritime Co. v. Southwestern Sugar & Molasses Co.** (4th Cir., 1951) 189 F. 2d 488; **Middle East Agency v. The John B. Waterman** (DC NY 1949) 86 F. Supp. 487.

6. Because this loss occurred as a proximate result of the deviation arising by virtue of the on-deck carriage, which would not have occurred if carried under deck in conformity with the contract of carriage, and further as the proximate result of the fault and neglect of Respond-

ent, its agents and employees; the Respondent is responsible therefor as is also the vessel in rem.

7. Libelant is entitled to recover from the Respondent M/V "SEA LANE" (ex. "Lillian"), Claimant-Respondent, SEABOARD SHIPPING COMPANY, and Stipulators, the value of the lost explosives in the amount of Eleven Thousand Two Hundred Seventy Four and 03/100 ($11,274.03) Dollars with interest at the rate of six (6) per cent per annum from February 7, 1963, together with its costs. e. g. **U.S. Smelting, Refining & Mining Co. v. Waterman SS Corp.** (DC La., 1945) 62 F. Supp. 511, aff'd (5th Cir., 1946) 155 F. 2d 687. **The Guanancita** (DC Fla. 1947) **supra; Norman v. Waterman SS Corp.** (DC Ala., 1952) 105 F. Supp. 590; **Sanile Corp. v. United Fruit Co.** (DC Ny 1947) 74 F. Supp. 64; § 55.03 F.S.A. Decree for Libelant in conformity with the foregoing is being entered herewith.

DATED at Miami, Florida, the 8 day of October, 1964.

CHARLES B. FULTON
United States District Judge

[TITLE OMITTED]

FINAL DECREE

Filed Oct. 13, 1964. Miami. U. S. District Court, Southern District of Florida.

THIS CAUSE having come on for trial, and the Court having filed its Findings of Fact and Conclusions of Law, it is thereupon

ORDERED, ADJUDGED AND DECREED:

1. That the Libelant, E. I. duPONT deNEMOURS AND COMPANY, INCORPORATED, a Delaware corporation, have, receive and recover of and from the Motor Vessel "SEA LANE" (ex. "Lillian") and SEAROAD SHIPPING COMPANY, Claimant-Respondent, and the Stipulators for costs and value in behalf of said Motor Vessel and Claimant-Respondent, the sum of Eleven Thousand, Two Hundred Seventy Four and 03/100 ($11,274.03) Dollars, with interest thereon at six (6) per cent per annum from February 7, 1963, until paid, together with its costs to be herinafter taxed; and

2. That unless this decree be satisfied, or proceedings thereon stayed by an appeal within twenty (20) days after entry of this Decree, the Libelant have execution against the Claimant-Respondent and its Stipulators for costs and for value, their goods, chattels and lands, forthwith to satisfy this decree.

DATED at Miami, Florida, this 8 day of October, 1964.

CHARLES B. FULTON
United States District Judge

[TITLE OMITTED]

JUDGMENT

Appeal from the United States District Court for the Southern District of Florida.

Before JONES and BROWN, Circuit Judges and BREWSTER, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Searoad Shipping Company and the Claimant, Searoad (Bahamas) Ltd., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 26, 1966

Issued as Mandate:

[TITLE OMITTED]

U. S. Court of Appeals. Filed July 18, 1966, Edward W. Wadsworth, Clerk.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of Ninety days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within Ninety days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of Ninety days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 18th day of July, 1966.

/s/ JOHN R. BROWN
United States Circuit Judge

App. 13

[TITLE OMITTED]

(May 26, 1966.)

Before JONES and BROWN, Circuit Judges and BREWSTER, District Judge.

BROWN, Circuit Judge: The District Court in this libel for cargo damage cast the M/V Sealane in rem and her owners in personam for the total loss of a deck-loaded cargo of high explosives resulting from heavy weather on the short voyage from Key Largo in the Florida Keys to Freeport, Grand Bahama Island. The Court did so on the basis that deck-loading the cargo covered by a clean, under-deck bill of lading amounted to a deviation making the vessel an insurer. The Court also found unseaworthiness in the manner of stowage in view of weather conditions which could be expected for that season. The shipowner attacks, as it must, both grounds. Unseaworthiness is challenged on the ground that while one could expect to encounter winds up to 55 k.p.h. with resulting heavy seas at that season, a specific inquiry at the Weather Bureau on the eve of departure elicited a favorable forecast for the expected duration of that short voyage. As to deviation, the shipowner urges two things. First, notations on the shipping documents—bills of lading and shipping export declarations—indicated that the goods were to be stowed under the direction of the Coast Guard and this meant that by approving on-deck stowage, the Coast Guard necessarily certified that under-deck stowage,

was not permissible. Second, this one followed about eight prior shipments loaded, to the Shipper's[1] knowledge, on deck, so that the Shipper either consented to on-deck stowage, or the practice was so prevalent on shallow craft bound for these nearby islands as to amount to a custom of the port to ship on-deck despite under-deck clean bills of lading.

As we conclude the District Court was warranted in finding deviation, we affirm without reaching the unseaworthiness problem.

The M/V Sealane, we understand, is a converted LCI, approximately 150 feet in length, 24 feet beam, draft of 7 feet with a freeboard of about 5 feet. She has two under-deck cargo holds. Prior to taking on the deck-loaded explosives at Key Largo, February 6, 1963, the general cargo had been loaded into the holds at Miami. The explosives were stowed inside a van trailer which, in turn, was loaded on the after deck of the vessel. The trailer was secured with eight chains and turnbuckles, four on each side.

The vessel got under way about 5:00 P.M., February 6, bound for Freeport, Grand Bahama Island, a voyage which would normally take about twelve hours. About 9:30 P.M. weather and seas worsened, and at approximately 11:45 P.M. one of the eight chains parted. About 4:00 A.M the following morning, February 7, all chains on the port side of the trailer parted and the trailer and its contents went overboard. The Master estimated that winds got as high as 50 to 55 knots, although the Court found

[1]The Shipper is E. I. duPont deNemours Company, Inc.

that they did not exceed 40 to 45 knots with seas not exceeding 7 to 10 feet.

The shipping documents covering the cargo of High Explosives[2] consisted of the Shipper's export declaration and the ocean bills of lading. These were physically typed up, blanks filled in and otherwise completed by representatives of the Shipper. The Shipper's export declaration made reference to the Coast Guard[3] and the ocean bills of lading[4] bore the express certification by the Shipper concerning the dangerous character of the goods and the requirement that they be stowed under supervision of the Coast Guard.

As required by the Coast Guard Regulations issued pursuant to the Dangerous Cargo Act, 46 USCA §170, this cargo had to be loaded at Key Largo, the only authorized loading point, under the supervision of the Coast Guard after inspection of the vessel and issuance of the permit.

---

[2]The cargo, as described on the bills of lading, consisted of 800 cases High Explosives—Dynamite and 50 cases Cordeau Detonant Fuse (primacord).

[3]Typed in was this certificate:

"These commodities, licensed by U.S. for ultimate destination Grand Bahama Island * * * west end, for pick up at Freeport. Diversion contrary to U.S. law prohibited.

This was followed by:

"To be loaded only under the supervision of the U. S. Coast Guard."

This was signed by W. J. Schneider, Sr., agent for the Shipper.

[4]"This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations established by the Commandant of the Coast Guard and/or Interstate Commerce Commission.

E. I. duPont deNemours and Company, Inc.
By W. J. Schneider, Sr.
Florida Agent."

The bills of lading contained the Cogsa Clause Paramount, 46 USCA §1312.

The action of the Coast Guard is reflected solely by the official, certified copies of the certificate of inspections,[5] permit, and loading.[6]

With such ancient landmarks as *The Delaware*, 1872, 81 U.S. (14 Wal.) 579, 20 L.Ed. 779, and *St. John N. F. Shipping Corp. v. S. A. Companhia Geral Commercial Do Rio de Janerio*, 1923, 263 U.S. 119, 44 S. Ct. 30, 68 L.Ed. 201, 1923 AMC 1131, the shipowner recognizes that justifying on-deck shipment under a clean under-deck bill of lading is a formidable task. The Court, in *St. Johns*, after first stating that it was "not dealing with a case arising under a general port custom permitting above-deck stowage notwithstanding a clean bill, with notice of which all shippers are charged," went on to lay down the long-recognized rule: "When there is no such custom, and no express contract in a form available as evidence, a clean bill of lading imports underdeck stowage." And here, as there, "upon this implication * * * [the Shipper] had the right to rely." 263 U.S. at 124, 44 S. Ct at ...., 68 L.Ed. at 203. And although one highly respected authority raises a question whether under Cosga the awesome insurer consequence should now be visited on the vessel for non-geographical deviations,[7] and one Court

[5]The Vessel Inspection Certificate checked as "OK," fire equipment, working gear, hold inspection and magazine inspection. Opposite the latter was penned in: "Trailer lashed to main deck." The Certificate also showed that bilge and engine room inspection was "dry and clean;" no conditions existed on the vessel that would affect an explosive operation; and the vessel was in condition to receive the explosives.

[6]The Certificate of Loading attested that it had been loaded under the supervision of the Coast Guard Officer in accordance with the cargo plan, the manifest, and in compliance with applicable regulations, with no waiver by the Coast Guard of any navigation laws or regulations.

[7]Gilmore & Black, Admiralty §3-40, at 156 (1957), considering especially the impact of §4(4) and the exemptions afforded under §4(2) of Cogsa, 46 USCA §1304(2), (4).

of Appeals keeps a statutory, if not a contract, limitation alive,[8] we have no doubt that the insurer liability continues after Cogsa[9] to flow from on-deck deviation where the damage is causally related.[10]

We are clear that the shipowner's attempt to stem the tide of this formidable principle on the theory of the shipping document notations (note 3 & 4, *supra*) will not suffice. These notations are not in any sense a volitional act indicating some consensual agreement, express or implied. These are mandatory, flowing directly from the preemptory requirement of valid regulations. These are a part of the intricate statutory-regulatory structure[11] which aims at giving all persons in today's complex system of distribution meaningful notice as to the classification of the commodities within the hierarchy

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[8]See Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt, G.m.b.H., 7 Cir., 1963, 313 F.2d 872, 1963 AMC 665, affirming N.D.Ill., 1962, 206 F.Supp. 15, 1963 AMC 669A. Rejecting Jones v. The Flying Clipper, S.D.N.Y., 1953, 116 F.Supp. 386, 1954 AMC 259, the Seventh Circuit holds the $500 per package limitation applicable notwithstanding a deviation.

[9]Knauth leaves it in no uncertain terms.

> "It has become well settled that stowage of cargo on deck, when contrary to contract or custom of underdeck stowage, is such a fundamental breach of the contract of carriage as to displace the contract clauses which might benefit the carrier, and constitutes the carrier an insurer of the safe arrival of the goods at destination."

Knauth, Ocean Bills of Lading 260 (1953).

[10]Here, as in The Flying Clipper, note 8, supra, there is no doubt about the causal relation between the deviation and the damage. The M/V Sealane weathered the storm. Its under-deck cargo arrived safely. The reasonably heavy, but foreseeable, forces of nature did their damage because the cargo was deck loaded in a van trailer.

[11]The regulations, Part 146—Transportation or Stowage of Explosives or Dangerous Articles or Substances, and Combustible Liquids on Board Vessels, 46 C.F.R. §146.01 et seq., are promulgated by the Coast Guard pursuant to statutory direction, 46 USCA §170(7)(a), (b), (5), (6). In the scheme of the regulations dangerous articles are divided into 8 classifications, the major ones being: Explosives (146.20-1 to -300); Inflammable Liquids (§146.21-1 to -100); Inflammable Solids and Oxidizing Materials (§146.22-1 to -100); Poisons (§146.25-1 to -400).

of dangerous goods so that mandatory or otherwise adequate safeguards can be taken to avoid or minimize the risk of injury to property or persons during transportation.

Thus, the regulations, applicable expressly to shippers, §146.02-3, -5(c), require for export shipments that the shipper or his "duly authorized agent" prepare "an originating shipping order,"[12] §146.05-13, which must reveal, as a minimum, the "information required to be shown" by §146.05-12 for domestic shipments.[13] The shipping documents are the source from which the carrier derives needed information, makes up the manifest and proposed stowage plans, etc., §146.06-12,-14,-15, which are in turn, a part of the application for, and issuance of, the permit to load. §146.20-85,-87(a), (b); 46 USCA §170(7)(e).[14] And the Shipper's certificate here noted on the bills of lading (note 4, *supra*) follows almost to the letter the precise wording required by §146.05-11 (c).

Nor does the shipowner make any headway with that aspect of this theory that the Shipper, acknowledging or even certifying, that the cargo must be loaded under Coast Guard supervision thereby acquiesces in the type of stowage, above or under-deck, as approved by the Coast Guard. Of course, this theory rests on the assumption that in approving on-deck stowage, the Coast Guard necessarily declared that on-deck and on-deck only was

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[12] By note 1, this term includes "* * * (2) Ocean Bill of Lading." §146.05-13.

[13] See §146.05-12(f)(1)-(8). Of particular importance is (f)-(5) requiring use of the official authorized shipping name of each article as shown in the commodity list of regulations, §146.04-1, -5.

[14] The Shipper also has mandatory responsibilities as to labeling and marking of the goods for export, §146.02-10(a); §146.05-15 to 17. See also 46 USCA §170(10).

permissible. Again, in no sense a volitional act," action by the Coast Guard is a legal mandate. The statute, 46 USCA §170(7)(e), and the regulations forbid loading of explosives at places or aboard vessels except as permitted by the Coast Guard, §146.20-85, -87.

The stowage generally must be in accordance with that prescribed in the official Tables for the particular commodity. §146.06-9(a). This is true specifically for explosives of classes A, B and C. §146.20-100 to 300. Where the tables so permit, explosives may be stowed on deck, §146.20-19, provided conditions 19(a) through (k) are satisfied. For neither Dynamite[15] nor Cordeau Detonant Fuses[16] did the Tables mandatorily require on-deck stowage. Consequently, §146.06-9(b)[17] does not imperatively come into play. And this is so without regard to—and without our deciding—the effect it might conceivable have if, for a dangerous article moving under a clean under-deck bill of lading, the tables or other regulations inescapably required that the only permissible stowage would be on deck. Nor is any of this changed by the terms of §146.20-16, which permits the stowage of "small quantities of explosives" other than under-deck when "* * * (1) no other stowage is available." Certainly not on this silent record which merely reflected that the Coast Guard certified that stowage in the trailer van on-

[15]Listed as High Explosives, §146.04-5, (note 2, supra) Table A §146.20-100 calls generally for Magazine stowage.

[16]Listed as Cordeau Detonant Fuse, §146.04-5 (note 2, supra) Table C §146.20-300 permits stowage:
"On deck under cover"
"Tween decks readily accessible"
"Under deck away from heat"

[17]§146.06-9(b).. "When only one stowage is shown no other stowage shall be utilized. When more than one stowage is indicated any or all of the indicated stowage may be utilized. * * *"

deck was permissible, not in any sense certifying—as the shipowner contends—that this was the only permissible stowage permitted.

Consequently, the Coast Guard Regulations, the Shipper's shipping document certifications, and the Coast Guard approval of this stowage do not carry the day.

That leaves only the contention that for the movement of explosives on shallow draft vessels to the nearby island ports, it was the custom of the port to ship them on-deck. The Trial Court, however, had ample basis for rejecting this. The proof was equivocal at best, one estimate suggesting only that approximately 50% moved under-deck. It was equivocal both as to the nature of the craft on which such cargoes moved and certainly it did not even begin to show as *St. Johns, supra*, implies, that for cargoes being transported pursuant to clean under-deck bills of lading, the custom was nevertheless for on-deck stowage.

The further effort to show that on-deck stowage was with the consent of the Shipper likewise foundered. In the first place, the Trial Court made rulings on exceptions to the shipowner's answer and later, consistent with rulings on pleadings, rulings on proffered evidence which severely narrowed the scope of proof. From our vantage many of these rulings seem perhaps to confuse an impermissible effort to vary the written contract by parole evidence with the permissible proof of circumstances showing an intentional waiver of the terms of a written con-

tract by conduct.[18] We have no occasion to pass on the correctness of these rulings since none is urged as an error here. But the result was that all the Trial Court heard was that some eight shipments by this Shipper, covered by clean bills of lading, had moved to the islands by on-deck stowage. Practically no evidentiary details were revealed. Nor as to the shipments here in suit, or the other prior shipments, was there even a slight effort to show that acquiescence in deck stowage did, or could, amount to an authoritative waiver of under-deck shipment by one having requisite authority and awareness of the legal-practical significance of what was taking place.

The upshot was that the shipowner failed in all of these efforts to establish some basis for overcoming the law's implication that the clean, unclaused, bill of lading called for under-deck stowage. There being no legal justification for this on-deck stowage of cargo shipped pursuant to an under-deck clean bill of lading, this stowage amounted to a deviation casting the shipowner for the loss which was directly and causally related to the deck stowage. This makes it unnecessary to pass on the unseaworthiness holding.

AFFIRMED.

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[18] Corbin makes very clear that neither the parol evidence rule, 3 Corbin, Contracts §574 (1960 ed.), the Statute of Frauds 2 *id.* §310, nor express provision in the written contract against waiver by subsequent oral agreement or conduct, 3A *id.* §763, prevent the introduction of evidence that a party to the contract by subsequent conduct or agreement—oral or written—waived a condition to his performance of the contract. As clearly stated:

> "* * * [A] provision that an express condition of a promise or promises in the contract cannot be eliminated by waiver, or by conduct constituting an estoppel, is wholly ineffective. The promisor still has the power to waive the condition, or by his conduct to estop himself from insisting upon it, to the same extent that he would have had this power if there had been no such provision."

3A *id.* §763, at 531.

App. 22

TREASURY DEPARTMENT
U. S. COAST GUARD
CCGD7-3326 (Revised 6-56)

VESSEL INSPECTION PRIOR TO LOADING DESIGNATED DANGEROUS CARGO

VESSEL M/V Lillian DATE 6 February 1963 TIME 1000

LOCATION N. Key Largo, Florida Ship's Officer Present James Fox

When is vessel scheduled to start loading dangerous cargo? 1000

Fire Equipment
O.K.

Working Gear
O.K.

Hold Inspection
O.K.

Magazine Inspection Trailer lashed to main deck.
O.K.

Bilge & Engine Room Inspection
Dry & Clean

Conditions existing on the vessel that would affect an explosives operation.
None

Can vessel clear berth at any time during loading of explosives?
Yes

Is the vessel in condition to receive explosives in view of the above provided that applicable regulations are followed during the operation?
Yes

W. F. Palmer GM1
Inspection Officer
Captain of the Port Office
Miami, Florida

App. 23

TREASURY DEPARTMENT
U. S. COAST GUARD
CCGD7-3312

UNITED STATES COAST GUARD

Captain of the Port, Miami, Florida

CERTIFICATION

VESSEL LOADED WITH EXPLOSIVES OR OTHER DANGEROUS ARTICLES

The vessel named below is hereby certified to have been (loaded) under conditions as hereafter set forth:

Vessel M/V Lillian	Master James Fox
Loading Date 6 February 1963	Owner Colonial Trading Co.
Tons of Explosives 27.35 Tons	Agent Searoad Shipping Co.
Tons of Inflammables none	Charterer Searoad Shipping Co.

Place of Loading North Key Largo, Florida
Was (loading) supervised by a Coast Guard Officer Yes
Is a cargo plan of dangerous cargo in the files of the district Coast Guard Headquarters Yes

Is a manifest of explosives or other dangerous articles of cargo in the files of the District Coast Guard Headquarters Yes
Was the vessel (loaded) in compliance with the applicable regulations. Yes

If vessel was not (loaded) in compliance with the regulations, explain reason therefore none

Did the master of the vessel offer any objection to the (loading) practices No

Were any of the Navigation Laws or regulations waived by the Coast Guard none

If so identify each waiver and its essence

22169 (Signed) W. F. Palmer GM1
Inspecting Officer